Supreme Court, U.S.
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No. 99-1074

In The

Supreme Court of the United States

LOUISE ROBICHAUD SAMAROO,

Petitioner,

v.

AT&T MANAGEMENT PENSION PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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28pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

I. AT&T'S BRIEF IN OPPOSITION FAILS TO ADDRESS THE CRUCIAL ISSUE IN THIS CASE 1

II. THE WIFE'S CONDUCT DURING THE STATE COURT PROCEEDINGS IS IRRELEVANT TO THIS CASE 3

III. THE THIRD CIRCUIT OPINION PRESENTS A SIGNIFICANT RISK OF INCREASED ATTEMPTS TO LITIGATE DOMESTIC RELATIONS ISSUES IN FEDERAL COURT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

AT&T Management Pension Plan v. Robichaud, No. 98-5245 (3d Cir. September 24, 1999) 1

Atwater v. Baskerville, 89 N.J. Eq. 121, 104 A. 310 (Ch. 1918), *aff'd*, 90 N.J. Eq. 275, 106 A. 369 (E. & A. 1919) 4

Blue v. UAL Corp., 160 F.3d 383 (7th Cir. 1998) 9

Flitcroft v. Commissioner, 328 F.2d 449 (9th Cir. 1964) 2

Fulton v. Fulton, 204 N.J. Super. 544, 499 A.2d 542 (Ch. Div. 1985) 4

Hopkins v. AT&T Global Information Solutions, 105 F.3d 153 (4th Cir. 1997) 7

Miller v. Miller, 160 N.J. 408, 734 A.2d 752 (1999) 4

Payne v. GM/UAW Pension Plan, No. 95-CV-73554DT, 1996 WL 943424 (E.D. Mich. May 7, 1996) 2

Rivers v. Central & South West Corp., 186 F.3d 681 (5th Cir. 1999) 7

Ross v. Ross, 705 A.2d 784 (N.J. Super. Ct. App. Div. 1998) 3

United States v. Hennen, 300 F.Supp. 256 (D. Nev. 1952) 2

STATUTES

28 U.S.C. § 1738 ..... 1, 2

29 U.S.C. § 1056 1

STATEMENT OF THE CASE

AT&T's brief refers to certain correspondence between its representatives and the wife. This correspondence is included as a supplemental appendix to this brief (Supplemental Appendix at A-1-6). The wife encourages the court to review the correspondence as an indication of AT&T's attitude toward the wife through these proceedings.

ARGUMENT

I. AT&T'S BRIEF IN OPPOSITION FAILS TO ADDRESS THE CRUCIAL ISSUE IN THIS CASE.

AT&T agrees that "the focus of this case" is whether the New Jersey state court order requires it to provide the wife with "increased benefits (determined on the basis of actuarial value)." *See* Brief in Opposition at 4; 29 U.S.C. § 1056(d)(3)(D)(ii). The Third Circuit majority admitted that the state court order would not have provided the wife with increased benefits if it had been effective during the husband's lifetime. *AT&T Management Pension Plan v. Robichaud*, No. 98-5245, Appendix to Petition For Certiorari at A-12 (3d Cir. September 24, 1999) (hereinafter Third Circuit Majority Opinion). The entire point of the Third Circuit dissent, however, was that the state court order *was* effective during the husband's lifetime. The dispute over the effective date of the New Jersey order is the central issue in this case.

The New Jersey state court expressly stated that its order would be effective nunc pro tunc back to the date of the original divorce decree in 1984 (A-115), which was entered before the husband died in 1987. The Third Circuit dissent contended, and a district court in the Seventh Circuit has held, that under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts *must* accept and cannot question the nunc pro tunc nature of a state court order. *AT&T Management Pension Plan v. Robichaud*, No. 98-5245

at A-18 (3d Cir. September 24, 1999) (Mannsman, J., dissenting) at A-18 (hereinafter Third Circuit Dissenting Opinion); *Payne v. GM/UAW Pension Plan*, No. 95-CV-73554DT, 1996 WL 943424 (E.D. Mich. May 7, 1996) (A-130). Other federal courts have reached the same result in cases involving other types of nunc pro tunc state orders. *See Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964); *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1952).

Against this background, the wife expected AT&T's Brief in Opposition to provide this Court with some authority holding that the federal court need not respect the nunc pro tunc nature of the state court order. *But AT&T's brief does not even discuss the issue*! Indeed, the Full Faith and Credit Act, 28 U.S.C. § 1738, is not even listed in the Table of Authorities section of AT&T's brief. Brief in Opposition at v.

AT&T's failure to address the crucial issue in this case shows in compelling fashion how weak its position is. The wife has cited considerable authority holding that federal courts must respect the nunc pro tunc nature of state court orders. *AT&T has been unable to find a single contrary case*. Like the Third Circuit majority, AT&T argues that ERISA preempts state law, but ERISA does not and cannot preempt federal Full Faith and Credit law. The majority below *admitted* that a state court order effective during the husband's lifetime would not have been preempted. The wife and the dissent have provided considerable authority holding under the Full Faith and Credit clause, a provision of federal and not state law, that the order here was effective during the husband's lifetime. AT&T and the majority have never provided a single contrary case; indeed, they have not even addressed the issue. A decision entered without any supporting authority, against the weight of substantial existing authority, is surely in error.

II. THE WIFE'S CONDUCT DURING THE STATE COURT PROCEEDINGS IS IRRELEVANT TO THIS CASE.

In the absence of authority addressing the central question at issue here, AT&T attempts to distract the Court by raising issues regarding the wife's conduct during the state court proceedings. These arguments are made in the wrong forum. If the wife slept on her rights, then AT&T's proper course of action was to argue in state court against a nunc pro tunc effective date, and to appeal any adverse decision. Instead of making its arguments in the proper forum, a state appellate court, AT&T is making an end run, raising issues of state domestic relations procedure in federal court. The Full Faith and Credit Act requires the federal courts to give full faith and credit to *all* state court orders, regardless of whether the underlying state court action was diligently prosecuted.

Not content with asking this court to consider issues of New Jersey domestic relations procedure, AT&T also asks this court to consider issues of substantive New Jersey domestic relations law. In particular, AT&T argues that the mistake made by the wife was not the sort of mistake for which the law should grant relief, particularly since the wife is a matrimonial attorney; and that the trial court's order actually contravenes the law of New Jersey. *Ross v. Ross*, 705 A.2d 784 (N.J. Super. Ct. App. Div. 1998). Once again, AT&T's position shows no understanding at all of the limited jurisdiction of federal courts over domestic relations issues. The state court held that the mistake made by the wife was the sort of error which could be retroactively corrected under the substantive domestic relations law of New Jersey. The proper forum for contrary argument is the appellate courts of New Jersey, not the United States Supreme Court.

The wife invites the Court to compare AT&T's Brief in Opposition with its trial brief to the New Jersey state court, filed on August 21, 1990 (Supplemental Appendix at A-7.) The Court will quickly see that the two documents make many of the same arguments. AT&T is clearly asking the federal courts to exercise appellate review over a New Jersey state court decision. The Court will also see that AT&T told that state court that its holding *"will extend beyond the parties to the divorce decree"* (Supplemental Appendix at A-10) (emphasis added) – a position directly contrary to the one taken in AT&T's Brief in Opposition.

While the wife's conduct during the state court proceedings is irrelevant, she submits that AT&T's description of that conduct is mistaken. The state court proceedings were admittedly lengthy, but AT&T provides no authority that the delay was attributable to the wife's conduct. The delay was instead caused by mistakes with the court system itself, mistakes which accumulated to the point where the state court actually apologized to the wife for the delay in the proceedings. The wife did not sleep on her rights in state court.

AT&T is also wrong in asserting that the trial court's order was improper under New Jersey state law. The issue raised here simply did not arise in *Ross*, where the state court order at issue was not entered nunc pro tunc. The nunc pro tunc status of the present order is the entire foundation for both the wife's argument and the Third Circuit dissent. Ample New Jersey law permits nunc pro tunc amendment of mistakes in divorce decrees. *Miller v. Miller*, 160 N.J. 408, 734 A.2d 752 (1999); *Fulton v. Fulton*, 204 N.J. Super. 544, 499 A.2d 542 (Ch. Div. 1985); *Atwater v. Baskerville*, 89 N.J. Eq. 121, 104 A. 310 (Ch. 1918), *aff'd*, 90 N.J. Eq. 275, 106 A. 369 (E. & A. 1919).

Finally, the wife takes exception to AT&T's continued references throughout this case to the amount of other benefits awarded to her and to her children. The wife has

neither requested nor received charity from AT&T; she seeks to enforce contract and judgment rights. The benefits already received by the wife are from life insurance, the cost of which was shared equally by the husband and the wife pursuant to their property settlement agreement (A-78 to A-79). The benefits received by the two dependent children were independent death benefits, which AT&T was required to pay under the terms of the husband's employment. The *pension survivor benefits* at issue here arise from the husband's employment with AT&T; they are payable to the wife under a final state court order, valid on its face, which AT&T failed to appeal in state court. Whether AT&T thinks the wife has received "enough" is not the point. The point is that AT&T must comply with the terms of final judgments entered against it in state court, and that it cannot seek federal appellate review of state domestic relations decisions.

III. THE THIRD CIRCUIT OPINION PRESENTS A SIGNIFICANT RISK OF INCREASED ATTEMPTS TO LITIGATE DOMESTIC RELATIONS ISSUES IN FEDERAL COURT.

It is ironic to see AT&T claiming that the decision below will not result in increased attempts to litigate domestic relations issues in federal court, for the great majority of AT&T's own Brief in Opposition actually argues questions of state domestic relations law. In a sense, by raising state domestic relations issues in a federal forum, AT&T has refuted its own argument.

AT&T further argues that the Third Circuit decision will not result in an explosion of litigation because there has been no great incidence of *prior* litigation raising these issues. This contention misses the point. The wife does not argue that there is excessive present litigation; she argues that there will be excessive *future* litigation if

the principles behind the Third Circuit majority opinion are permitted to remain intact.

The danger of excessive future litigation arises from the nature of the QDRO provisions of ERISA. When Congress gave the federal courts jurisdiction to determine whether an order is actually a QDRO, it necessarily involved the federal courts to some extent in domestic relations litigation. As long as the federal involvement is limited to questions of federal law, the effect on the workload of the federal courts is manageable.

If federal courts hearing QDRO cases are permitted to consider issues of state law, however, the case load of the federal courts will rapidly become unmanageable. The total volume of divorce cases heard in state court is undeniably substantial, and essentially every divorcing couple owns retirement benefits. The great majority of these benefits are regulated by ERISA. Thus, the total number of QDROs entered each year in state courts is immense. If the federal courts have jurisdiction to consider state law issues every time a state court divides retirement benefits, there is a very real danger that the federal courts will be overburdened with domestic relations cases.

The Third Circuit majority opinion is a major intrusion upon core issues of state domestic relations law. The New Jersey state court originally divided the retirement benefits accumulated by the husband in the course of his marriage to the wife. It was then faced with a motion to correct a mistake in its prior order. The motion raised legitimately debatable issues of state domestic relations law, which AT&T recognized by intervening and appearing to contest it. The state trial court accepted the wife's position. Then, instead of appealing the substantive domestic relations issues to a state appellate court, AT&T sought collateral review in federal court. It ignored, and continues to ignore, the Full Faith and Credit Act in its

entirety. The great majority of its argument is a contention that the state trial court erred in granting relief to the wife, on grounds that her mistake was too serious and her delay in proceeding was too unreasonable. By any standard, *these are attempts to litigate substantive domestic relations issues in federal court.*

The result of the Third Circuit's decision is to encourage this sort of end run to federal court. Plan administrators will stop appealing or even appearing in state court actions, and they will instead argue in federal court that the state court judgment is substantively wrong. They will cite the Third Circuit's decision in this case as authority holding that the Full Faith and Credit Act does not bar their argument. (To the extent that the majority failed to expressly address full faith and credit, full faith and credit was clearly and directly addressed by the dissent, and future courts will reasonably assume that the majority intended to reject the dissent's argument.) The result will be that many more federal courts will confront exactly the same sort of brief which AT&T has presented to this Court: an attempt to raise state domestic relations law issues in a federal forum.

Contrary to AT&T's argument, the wife does not contend that there will be a specific explosion of attempts to divide survivor benefits after one spouse's death. The issue raised here is not by any means insignificant; it has arisen in one form or another in the Third, Fourth, Fifth and Seventh Circuits.[1] For the reasons previously highlighted by the wife, see Petition For Certiorari at 27, QDROs are difficult and complex documents even for the

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[1] In addition to this case (the Third Circuit) and *Payne* (the Seventh Circuit), see *Hopkins v. AT&T Global Information Solutions*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & South West Corp.*, 186 F.3d 681 (5th Cir. 1999). The results of the cases are divided: if this case had arisen in the Eastern District of Michigan, the wife would have prevailed.

experienced drafter, and the original draft frequently requires one or more revisions. Revision is needed not only because of the inherent difficulty of drafting QDROs, but also because many plan administrators (such as AT&T in this case) are either uncooperative or hostile when a QDRO is requested. The QDRO provisions of ERISA, of course, cover the great majority of all retirement benefit programs operating in this country. As a result, if the retirement benefits are to be *effectively* divided upon divorce, as Congress clearly intended, it is particularly important that federal courts defer to state law permitting the correction of mistakes.[2] Such deference is essential not only in cases involving death benefits, but in cases involving all types of retirement benefits, because QDROs are so difficult to draft correctly on the first attempt. The need for retroactive entry and modification of QDROs is an important policy factor supporting the wife's position.

The wife raises instead the broader issue of whether federal courts hearing QDRO issues of all sorts will be permitted to second-guess state courts on issues of state domestic relations law, thereby effectively tying the hands of state family law judges. If such second-guessing is permitted, the plan administrators will frequently do exactly what AT&T has done here: use the federal courts as a substitute for raising state law issues in state trial and appellate courts. This practice is particularly likely because federal courts normally apply stricter procedural and substantive rules than the uniquely equitable rules which often prevail under the law of domestic relations. If the federal courts become involved in even a fraction of the substantive domestic relations litigation occurring in

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[2] The ability to correct errors is likewise fundamental if retirement benefits are to be effectively used to enforce alimony and child support judgments, another important purpose of QDROs.

state court, there is a real and substantial danger that the resources of the federal courts will be unduly strained. This danger exists not only in cases dividing survivor benefits after one spouse has died, but also in any case where the qualification of a QDRO is a contested issue.

Indeed, as stated above, at an earlier stage of this case, on August 21, 1990, AT&T itself suggested that *"[t]his matter poses complex issues, and the impact of its resolution will extend beyond the parties to the divorce decree."* AT&T's letter brief to the state court at 3 (Supplemental Appendix at A-10) (emphasis added). This statement stands in stark contrast to AT&T's present position that the Third Circuit's decision will affect hardly anyone.[3]

The Seventh Circuit has recognized the dangers of widespread federal court review of state decisions dividing retirement benefits:

> Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-guessing state judges' decisions would be repellent. *Unsuccessful litigants would refile their briefs from the state litigation with pension administrators, in the hope that lightning may strike as laymen review the work of judges.* Far better to let the states' appellate courts take care of legal errors by trial judges.

Blue v. UAL Corp., 160 F.3d 383, 386 (7th Cir. 1998) (emphasis added).

To prevent the danger posed by federal courts hearing substantive domestic relations issues, this court should insist that federal courts hearing QDRO issues adhere strictly to the requirements of the Full Faith and Credit Act. In particular, the federal courts should be required to give final state court orders exactly the same

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[3] Indeed, given the number of persons employed by AT&T throughout the United States, this case will almost necessarily have a widespread nationwide effect.

effect they have in state court, on all state law issues. Preclusive effect must be given not only on substantive issues, but also on procedural issues such as the effective date of the order.

If the Third Circuit majority had shown proper deference to the New Jersey order, it would have agreed with the dissent's position. All parties agree that the state court could have entered, during the husband's lifetime, an order dividing his survivor benefits. Under the state law of New Jersey, because the order dividing the survivor benefits was rendered nunc pro tunc, the order at issue here effectively *was* entered during the husband's lifetime. The Full Faith and Credit Act requires that the federal courts defer to, and not question, the nunc pro tunc nature of the New Jersey state court order. Because that order became effective before the husband died, enforcement of the state court order is not barred by ERISA.

CONCLUSION

For the reasons stated above, the wife respectfully requests that the Court grant her Petition for Certiorari.

Respectfully submitted,

LOUISE ROBICHAUD SAMAROO, ESQUIRE
4585 Route 27
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(609) 924-9699

Petitioner Pro Se

ASA
An AT&T Company

[Addresses Omitted In Printing]

October 10, 1996

Ms. Lousie M. Robichaud, Esq.
Attorney At Law
4585 Route 27
CN 166
Kingston, NJ 08528

Re: Louise Robichaud-Samaroo
Winston R. Samaroo (Deceased)
Estate of Winston R. Samaroo

Dear Ms. Robichaud:

AT&T Corp. is in receipt of your recent correspondence which included a proposed domestic relations order ("Proposed Order") in the matter of *Louise Robichaud Samaroo v. Winston R. Samaroo v. Estate of Winston R. Samaroo (Third Party Defendant)*. Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-000454-96. The Proposed Order cannot qualify as a qualified domestic relations order ("QDRO") as that term is defined under the Employees Retirement Income Security Act of 1974, as amended ("ERISA") and under the terms of the AT&T Management Pension Plan ("AT&TMPP") for the following reasons.

It is our understanding that the intent of the Proposed Order is to provide you with a portion of a survivor annuity benefit from Winston R. Samaroo's vested pension benefit. As you know, at the time of his death, Mr. Samaroo was a vested participant in the AT&TMPP. However, at the time of his death, Mr. Samaroo was not

married to you due to a divorce judgment that was finalized on October 25, 1984. Under the terms of the AT&TMPP, no benefits are payable upon the death of a vested plan participant unless such participant is survived by a lawful spouse. Since you were not married to Mr. Samaroo at the time of his death, under ERISA and the terms of the AT&TMPP, you are not entitled to a survivor annuity benefit from the AT&TMPP.

The qualified domestic relations order ("QDRO") rules under ERISA allow a surviving former spouse to be treated as the surviving spouse for purposes of survivor annuity benefit entitlement to the extent provided in a QDRO. ERISA Section 206(d)(3)(F). At the time of Mr. Samaroo's death you were not his surviving spouse nor were you designated as his surviving spouse prior to his death under the terms of a domestic relations order that was qualified by AT&T Corp. prior to his death. Since under the provisions of the AT&TMPP you were not a surviving spouse of Mr. Samaroo at the time of his death, you are not entitled to a survivor annuity benefit under a QDRO and under the terms of the AT&TMPP. In addition, one of the requirements for a QDRO is that a domestic relations order may not require a "plan to provide any type or form of benefits, or any option not otherwise provided under the plan." ERISA Section 206(d)(3)(D)(i). You were not entitled to a survivor annuity benefit under the AT&TMPP as of the date of Mr. Samaroo's death, or at anytime during the ensuing nine years. Since the Proposed Order requires the AT&TMPP to provide a benefit that is "not otherwise provided under the plan", it cannot be a QDRO. Moreover, since Mr. Samaroo is deceased, there is no participant remaining with respect to whom

the existence of an alternate payee's right to a survivor annuity benefit could be created or recognized. ERISA Section 206(d)(3)(B)(i)(I).

If you should have any questions, I may be reached at the address in this letter, Room 6B12 or on 908 271-2668.

Sincerely,

/s/ Ann-Marie Black
Ann-Marie Black
Counselor
Domestic Relations Matters

(LOGO) **AT&T**

[Addresses Omitted In Printing]

October 27, 1988

Louise M. Robichaud, Esquire
50 Main Street
P.O. Box 166
Kingston, NJ 08528

Dear Ms. Robichard:

This will supplement my letter to you of June 23, 1988.

Please be advised that the Final Judgment of Divorce which you submitted with your May 16 letter has been reviewed by our legal counsel. It is their opinion that all entitlements concerning Mr. Samaroo's pension ceased with his death. You are not entitled to any survivor annuity under the terms of our pension plan, nor were you awarded such under the terms of the Judgment.

Sincerely,

/s/ Sallyanne S. Rossiter
Sallyanne S. Rossiter
Assistant Staff Manager
Domestic Relations Matters

cc: Cheryl Kramer

ACTUARIAL
SCIENCES
ASSOCIATES INC. (LOGO) **AT&T**

[Names And Addresses Omitted In Printing]

December 12, 1988

Louise M. Robichaud, Esq.
50 Main Street
P.O. Box 166
Kingston, NJ 08528

Dear Ms. Robichaud:

As Ms. Sallyanne Rossiter and Joe Sabounghi, Esq. have previously indicated, the provisions of the Final Judgement of Divorce do not entitle you to receive any survivor benefits under the AT&T Management Pension Plan. You are correct, as stated in your letter of November 3, 1988, that a Plan Administrator may (but is not required to) accept pre-REA orders, even though they do not explicitly meet all the requirements for QDROs. However, your Order creates a right only to a portion of your ex-husband's pension benefits, payable at his retirement. There is absolutely no indication in the Order of any right to survivor benefits.

ERISA Section 206(d)(3)(D)(ii) provides that one of the requirements of a QDRO is that it "does not require a plan to provide increased benefits (determined on the basis of actuarial value)." Providing a survivor benefit, when none is even hinted at in the Order, would require the Plan to provide increased benefits. Further, an amended order, granted ex-parte, could not qualify because there is no Participant remaining with respect to

whom the existence of an alternate payee's right to a survivor benefit could be created or recognized (ERISA Section 206(d)(3)(B)(i)(I)). All rights relating to and arising from Mr. Samaroo's participation in the Plan expired upon his death.

Because you are neither a Participant nor Beneficiary (nor can you possibly become such under the circumstances) under the AT&T Management Pension Plan, you do not have standing to bring a claim before the AT&T Employee Benefit Committee. We have enclosed the Summary Plan Description as an accommodation. We will be happy to provide you with copies of the Retirement Plan at your request at a charge of $0.10/page.

If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Cheryl J. Kramer
Cheryl J. Kramer

CJK/av
Enclosure

cc: S. J. Macey
J. Sabounghi
S. Rossiter

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August 21, 1990

VIA HAND DELIVERY

Hon. Phillip S. Carchman
Presiding Judge – Family Part
Superior Court of New Jersey
650 South Broad Street
Trenton, New Jersey 08650

Re: Samaroo v. Samaroo
Docket No. FM-07705-85

Dear Judge Carchman:

I am writing on behalf of the AT&T Management Pension Plan ("AT&T-MPP") in response to the August 19, 1990 letter of Louise M. Robichaud, Esq. and the Supplemental Certification of Joel N. Spivak, Esq., submitted in support of plaintiff's pending motion to amend her 1984 Divorce Judgment *nunc pro tunc* and to join AT&T-MPP as a party to this action. This motion is presently returnable before Your Honor on August 24, 1990. In these most recent submissions, plaintiff for the first

time challenges AT&T-MPP's standing to be heard in this court in opposition to her application, and asks this court to disregard AT&T-MPP's opposition brief.

Before addressing this "standing" issue, plaintiff's disingenuous tactics must be brought to the Court's attention. The Court should be aware that although plaintiff now contends AT&T-MPP is not a proper party to these proceedings, on July 23, 1990 plaintiff served a Request For Production of Documents upon AT&T-MPP in this action pursuant to Rule 4:18, which is applicable only to discovery requests by one party to another party. (A copy of plaintiff's July 23, 1990 cover letter and the document request are annexed hereto as Exhibit A). This request (which was telecopied to defense counsel on July 23) was timed to require AT&T-MPP to produce these documents in advance of the return date of this motion.[1] It is patently incredible that, after the extensive history of these proceedings (detailed in AT&T-MPP's initial brief), and after pursuing discovery from AT&T-MPP in this action incident to the pending motion, plaintiff has now done a complete about-face and is contending for the first time that AT&T-MPP has no interest in this litigation, and no right to be heard on this application.

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[1] As reflected in our correspondence to plaintiff annexed as Exhibit B, AT&T-MPP has in good faith compiled documents responsive to this document request, and stands ready to comply in a timely manner. However, we have requested a clarification of plaintiff's position(s) in light of her recent tactics.

It should also be noted that the motion presently before the court seeks to join AT&T-MPP as an indispensable party to this action pursuant to Rule 4:28. To our knowledge, this aspect of the motion has never been withdrawn, and therefore AT&T clearly has "standing" to be heard. However, if and to the extent plaintiff has now abandoned that request for relief, and assuming further she has the right to do so,[2] concurrent with this response we have filed a cross-motion to intervene in this application on behalf of AT&T-MPP. To the extent this application might be viewed as untimely, we ask the court to take into consideration that plaintiff's August 19, 1990 letter was AT&T-MPP's first notice of any objection to its participation (again, this motion was originally filed in April 1989), and plaintiff has been fully aware at all times of AT&T-MPP's intention to oppose the present application and to submit a brief in opposition thereto. Alternatively, if the Court determines this cross-motion is out of time, we would request a two-week adjournment of plaintiff's motion so that all issues may be considered.

I. AT&T-MPP Has "Standing" To Oppose the Pending Application.

Plaintiff and Mr. Spivak now assert that AT&T-MPP is "neither a necessary party . . . a valid party . . . or even an interested party" in this "action for divorce." (See

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[2] AT&T-MPP has a material interest in the outcome of this application (see discussion, *infra*), and as such is an indispensable party.

Spivak Certification, ¶ 3)[3]. Despite plaintiff's recent attempts to color it as such, this is not a simple matrimonial matter between plaintiff and her former husband to correct a minor mistake in a property settlement agreement, and AT&T-MPP is not merely an interloper with no interest in the outcome of this application. This matter poses complex issues, and the impact of its resolution will extend beyond the parties to the divorce decree.[4] The manifest purpose of the present application is to obtain a

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[3] The nature of Mr. Spivak's participation on this motion is not clear. Specifically, it is unclear whether he has submitted certifications simply as a fact witness in support of the plaintiff's application, or whether he is somehow purporting to represent the decedent Winston K. Samaroo in this matter, or to speak on his behalf. Mr. Spivak indicates only that he was the decedent's "former attorney and personal friend." Is he also Ms. Robichaud's "personal friend"? We note that Ms. Robichaud is an attorney specializing in matrimonial law. Did she recommend Mr. Spivak to her former husband to serve as his attorney in "friendly" divorce proceedings? We note this only because Ms. Robichaud and Mr. Spivak are so remarkably speaking with one voice in their efforts to achieve the desired result they apparently both desire. Furthermore, to the extent this application is predicated solely on plaintiff's self-serving statements and the speculations of her deceased husband's former attorney, both sources of which are open to question based upon credibility, AT&T-MPP maintains that even if plaintiff had some legal basis for the relief sought (which she does not), she has not met her burden of proof by "clear and convincing evidence," and therefore this application must be denied.

[4] This is readily apparent from the discussion in AT&T-MPP's August 3, 1990 letter brief submitted in opposition to this application, and is reflected in the extensive history of this litigation.

modified divorce judgment which plaintiff will then present to AT&T-MPP and, eventually, take to federal court and attempt have enforced against AT&T-MPP as a QDRO. As such, AT&T-MPP is materially interested in the outcome of the pending motion.

Because it is clear that if plaintiff is successful in obtaining an amended judgment she will attempt to obtain benefits from AT&T-MPP, it is clear that AT&T-MPP's interests – and the interests of pension plan participants and beneficiaries – will be affected as result of this court's determination. AT&T-MPP is therefore entitled to be heard (whether by virtue of plaintiff's motion to join it as a party or on its cross-motion to intervene) on this application so that its interests – and the interests of the plan participants and beneficiaries – are adequately represented. Certainly those interests are not protected at the present time (see footnote 3, *supra*).

II. Plaintiff Has Failed To Demonstrate Any Legal Basis For the Relief Sought.

As to the substance of plaintiff's legal arguments in support of her application, the bottom line remains that the relief plaintiff seeks is outside the scope of the relief which may validly be granted *nunc pro tunc* by this Court, and therefore plaintiff's reply papers to justify or support any other result.

Contrary to the unsupported legal argument at paragraph 4 of Mr. Spivak's Supplemental Certification, "oversight or inadvertence" by the parties in the drafting of the Separation Agreement is not the equivalent of an "oversight or inadvertence" by the court such that it may

be corrected by the court *nunc pro tunc*. The function of *nunc pro tunc* relief is to correct judicial errors or omissions resulting from some oversight or inadvertence by the court – so that the record may speak the truth. *Nunc pro tunc* relief is not available to change an order that was accurately rendered by the court but contained mistakes or omissions by the litigants. Simply stated, *nunc pro tunc* relief cannot be used to change an order so that it states what, in retrospect, a litigant wishes it had stated at the time it was entered.

Apparently recognizing that *nunc pro tunc* relief is not available in the circumstances, plaintiff in her reply brief attempts to characterize the relevant terms of the Separation Agreement as a "mutual mistake" and asks the court to "reform" the Agreement to conform to the parties' supposed "intent." Even putting aside that the original application was not for reformation of an instrument, the doctrine of mutual mistake is no more availing to plaintiff than is the limited *nunc pro tunc* authority of the Court.

It is true that a matrimonial agreement may be reformed when, through mutual mistake or the mistake of one party accompanied by the fraudulent knowledge of the other, it does not express the parties' true agreement. *Capanear v. Salzano*, 222 N.J. Super. 403, 407 (App. Div. 1988). However, "mistake," as a basis for the reformation of an instrument, exists only when a person, under some erroneous conviction of law or fact, does or omits to do something which, but for the erroneous conviction, he would not have done or omitted. *Toth v. Vazquez*, 8 N.J. Super. 289 (App. Div. 1950); *Savings Inv. & Trust Co. v. Connecticut Mut. Life Ins. Co.*, 17 N.J. Super. 50

(Ch. Div. 1952). Furthermore, as is clear from the quotations of case law contained in plaintiff's own reply brief, the "mistake" must be one which existed at the time the agreement was entered into. *See, e.g., St. Pious X House of Retreats v. Camden Diocese,* 88 N.J. 571, 579 (1982). Here, there was no mistake of law or mistake of fact at the time either the Separation Agreement or Final Judgment of Divorce was entered into -- for the plain and simple reason that at that time, the parties could not do what plaintiff now says they intended to do, *i.e.* provide for the alienation of Winston's pension benefits.

Therefore, the doctrine of mutual mistake is inapplicable for reasons similar to those which preclude *nunc pro tunc* relief. As detailed in AT&T-MPP's initial brief, the parties could not have done in 1983 or 1984 what plaintiff now says they intended to, because until 1985 – after the final judgment of divorce – there was no provision in ERISA for the type of alienation or assignment of pension benefits that plaintiff has been seeking. For this reason alone, plaintiff is not entitled to "reformation" of the divorce judgment on grounds of supposed "mistake."

It should further be noted, however, that while plaintiff now asserts that the parties intended to provide for survivor benefits at the time the Separation Agreement was entered into (but failed to do so due to "mistake"), the Certification she originally submitted in support of this application, dated April 12, 1989, indicated that the reason the 1983 Agreement was silent as to survivor benefits was that Winston's death "was a contingency no one entertained or anticipated at the time." (Robichaud Cert., at ¶ 6). If this "contingency" was not contemplated

at the time the Agreement was entered into, then certainly there was no "mistake in the preparation of the Agreement" and therefore no basis for reformation. It is one thing to say that the parties agreed to something which, as a result of "mistake," was inadvertently not included when the agreement was reduced to a writing. It is quite another to state that something was not included in the writing because no one thought of it at the time. In the latter situation, reformation is plainly unavailable. Reformation is not a remedy which is granted based merely upon speculation that a decedent "would" have wanted it that way." As set forth in AT&T-MPP's original brief, a court should not make a better contract for the parties than they have voluntarily made for themselves.

III. The Relief Sought by Plaintiff Is Barred By Rule 4:50-2.

It is now abundantly clear from the papers submitted on plaintiff's behalf that she seeks relief from the operation of the Final Judgment of Divorce solely because of claimed mistakes or omissions as to the terms of the 1983 Separation Agreement incorporated into the divorce judgment. While under Rule 4:50-1(a) a party may obtain relief from a final judgment based on mistake, inadvertence or excusable neglect, any application for such relief must be made within one year of the entry of judgment. R. 4:50-2. As to R. 4:50-2's applicability to the present case, "it is well settled that relief from the equitable distribution provisions of agreements which are incorporated in divorce judgments is subject to the standards of this rule." *Capanear v. Salzano*, 222 N.J. Super. 403, 408

(App. Div. 1988). Here, six years have passed from the entry of final judgment, and plaintiff's attempt to modify the divorce judgment is clearly barred by the one year time limitation of R. 4:50-2.

CONCLUSION

For all of the foregoing reasons, and those set forth in AT&T-MPP's initial brief, plaintiff's motion to amend the final judgment of divorce *nunc pro tunc* to October 24, 1984 should be denied.

Respectfully submitted,

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